

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Revision of the Procedures Governing	)	MB Docket No. 05-210
Amendments to FM Table of Allotments and	)	RM-10960
Changes of Community of Licenses in the	)	
Radio Broadcast Services	)	

To: The Commission

**REPLY COMMENTS OF  
PROMETHEUS RADIO PROJECT  
and  
MEDIA ACCESS PROJECT**

Prometheus Radio Project and Media Access Project (“Prometheus”) file these reply comments in support of comments filed by William Clay (“Clay”) and REC Networks (REC). The proposed rule making would further injure, rather than enhance, the connection between radio stations and the communities they serve. If the Commission genuinely intends to promote localism, it should instead move expeditiously to open the long delayed LPFM window for 10-watt LPFM stations and open a new window for 100-watt stations. Further, the Commission should adopt the proposals set forth by Clay and REC.

**INTEREST OF PARTIES**

*Prometheus Radio Project* is a non-profit organization that works to promote the low-power FM (LPFM) radio service and to educate the public on the value of the LPFM service. LPFM stations provide opportunities for unique community voices to speak through the public airwaves in a way wholly different from that of their full power cousins. In an age of consolidation, centralized programming decisions, and

relentless commercialization, LPFM provides an opportunity for local, noncommercial organizations to provide programming of local interest.

The proposed rule changes raise troubling questions for LPFM stations. If full power stations can change their community of license without any opportunity for comment, LPFM broadcasters may find themselves suddenly and unexpectedly facing new programming and interference challenges. Given that full power stations have priority over LPFM stations, even pre-existing LPFM stations, the ability to comment on proposed new full power stations entering the market is important to the continued health of the LPFM service. Further, LPFM licensees are entitled to a stable table of allotments, so that they can rationally anticipate whether new full power stations will seek licenses or seek to expand their power, subjecting LPFM licensees to the danger of encroachment.

*Media Access Project* is a non-profit law firm dedicated to the public's right to speak and hear information from a diversity of sources in the electronic media of today and tomorrow. The proposed rule changes will make it more difficult for MAP to advise clients and challenge market changes that have the effect of increasing the number of voices a single entity may have in a market.

## ARGUMENT

The Commission has received abundant evidence in the last five years that consolidation in local radio markets has seriously damaged the connection between radio licensees and the communities they serve. In the 2002 Biennial Review Proceeding, the Commission received over *2 million* comments opposing further relaxation of the ownership rules and documenting the lack of connection Americans

now have with their supposedly local media. The subsequent proceeding on localism produced more than 845,000 comments, as well as hours of testimony at Commission field hearings. Yet the Commission proposes to further limit the input of members of local communities and place further control of the community of license in the hands of the licensees by converting the process of changing the community of license to a minor amendment. Whatever efficiencies and convenience to full power licensees such a change would make, it cannot offset the real harm to the public interest these proposals would cause.

**I. THE CHANGE WILL UNDERMINE THE COMMISSION'S EFFORTS TO PREVENT FURTHER CONCENTRATION ON LOCAL RADIO MARKETS.**

So overwhelming was the evidence that concentration damaging local radio markets that the Commission chose to change its market definition from contour overlap to Arbitron's metro market definitions. 18 FCCRec 13,620, 13713 (2003). In selecting the Arbitron market definition, the Commission stressed the importance of promoting competition in the radio service and maintaining the close, local connection between radio licensees and their communities. *Id.* at 13716. The Commission observed that one of the flaws with the contour-methodology previously employed was that it allowed excessive concentration of radio voices in the hands of a few. *Id.* at 13717-19.

In particular, the Commission stressed the importance of having a clearly defined market so that it could properly monitor the levels of concentration and ensure that a diversity of voices served local communities. *Id.* at 13725-26. The Commission

further acted “to deter parties from attempting to manipulate Arbitron market definitions” as an additional safeguard to protect diversity and localism in the radio service. *Id.* Notably, a panel of the Third Circuit – although reversing numerous other changes adopted in the *2002 Biennial Review Order* – explicitly affirmed both the change from contour-overlap and the additional safeguards as rational and reasoned decision making designed to promote the public interest. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 423-25 (3<sup>rd</sup> Cir. 2004).

The proposed rule changes threaten to undermine the positive effects the Commission sought to achieve through its change in the market definitions. Allowing the parties to change communities as a minor amendment will allow parties to evade the market definitions the Commission only recently established and was at such pains to protect from private manipulation.

Prometheus and MAP freely acknowledge that parties may have reasons to change their community of license other than to evade the ownership limits. The problem arises with the use of the minor amendment process, which would shield such changes from careful review and allow those entities that *do* wish to manipulate the process the freedom to do so.

Further, history shows that once a loophole emerges, parties are quick to exploit it and convert it from exceptional case to the rule. It did not take long for LMAs to become a popular means of circumventing the ownership rules. More recently, following the Media Bureau’s unfortunate and ill-considered opinion permitting

purchase of a KDLH in Duluth by Malara,<sup>1</sup> circumventing the local ownership rules through a legal fiction, has spawned a host of imitators using the “Malara” exception. If the Commission permits changes in the community of license via minor amendment, Prometheus and MAP confidently predict that this will become a new mechanism for manipulating local ownership limits outside public scrutiny.

## **II. THE COMMISSION MUST CONSIDER THE POSSIBLE IMPACTS ON LPFM SERVICE**

In assessing the potential harms of allowing licensees to change community of license by minor modification, the Commission dismisses the concerns of counter-proponents as having had numerous opportunities to apply for FM stations and stating that “all parties with *bona fide* interests in adding new station allotments will be on an equal footing.” *NPRM* at ¶25. This ignores the possible harm to existing and future LPFM stations.

Because LPFM is a secondary service, it is subject to “encroachment” by new full power stations. A change in the table of allotments for any reason may seriously injure the interests of an LPFM licensee. Furthermore, it may have an impact on the availability of future LPFM licenses in either a 100-watt or 10-watt window.

For this reason, Prometheus strongly objects to the proposal to allow changes by

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<sup>1</sup>*Application for Assignment of License for KDLH-TV, Duluth., Minnesota (Facility ID #4691), Letter Decision, FCC File No. BALCT-2004504ABU, DA 04-3908(MB rel. Dec. 14, 2004.*

minor modification. LPFM stations have a strong interest in maintaining the opportunity for any change in the Table of Allotments, one not addressed by past opportunities to apply for full power stations. Nor will current or potential LPFM licensees stand “on equal footing” with full power licensees.

### **III. THE PROPOSALS OF REC AND CLAY WILL PROMOTE THE INTERESTS OF LOCALISM.**

REC and Clay both raise valid criticisms of the Commission’s *Tuck* Analysis and its impact on the interests of localism and diversity. Prometheus supports these comments and urges the Commission to adopt their analysis.

In particular, Prometheus echoes the concern expressed by Clay that the Commission should either abandon local service preference or give it real meaning. The Commission has received reams of evidence in countless proceedings that the link between local communities and the full power stations licensed to serve them has become increasingly tenuous. Rather than requiring licensees to demonstrate how they serve the community, the Commission simply assumes they do, and places a *de facto* impossible burden on anyone challenging a license for failure to serve the local community.

Redefining the *Tuck* criteria, as proposed by REC, can have a positive impact on the distribution of licenses within a community and help reenforce the local quality of radio. Similarly, the proposals by Clay to give meaning to local preference will enhance these public interest goals.

### **IV THE COMMISSION SHOULD MOVE EXPEDITIOUSLY ON PROMETHEUS’ PROPOSALS IN THE PENDING LPFM RULEMAKING.**

Finally, Prometheus observes that the Commission can take several steps to improve the quality of local radio aside from giving full power licensees even greater flexibility. In the last five years, the LPFM service has demonstrated that low-power FM broadcasters add an important element of local programming to the FM dial. The Commission should therefore move expeditiously in to adopt the proposals made by Prometheus and others in Docket No. 99-25. Specifically, the Commission should act to (a) prevent further encroachment by full power stations, (b) give primacy to LPFM broadcasters that provide 8 hours a day of original, locally generated content over translators that import distant or satellite content, and (c) open a new filing window for 10-watt and 100-watt LPFM stations.

### CONCLUSION

Wherefore, the Commission should not adopt the proposal to allow changes in community of license by minor amendment, but should instead adopt the changes proposed by REC and Clay in their comments.

Respectfully submitted,

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